# STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2003G128

### INITIAL DECISION AND ORDER RE: RESPONDENT'S MOTION TO DISMISS

KEM RELIFORD.

Complainant,

VS.

## DEPARTMENT OF TRANSPORTATION,

Respondent.

This matter is before the ALJ on Respondent's verbal Motion to Dismiss and Complainant's response thereto. The ALJ, having reviewed the pleadings, file and relevant case law and being sufficiently advised thereof, enters the following order:

#### PROCEDURAL HISTORY

On October 15, 2003, the Board adopted a preliminary recommendation in this matter, granting Complainant a hearing on his claim of racial discrimination arising out of the termination of his probationary employment by Respondent, Colorado Department of Transportation ("CDOT"). The evidentiary hearing in this matter was held on February 9, 2004. Complainant represented himself and Respondent was represented by Luis Corchado, Assistant Attorney General.

Complainant presented his case-in-chief without testifying himself. Respondent, at the close of Complainant's case-in-chief, moved for dismissal under C.R.C.P. 41(b)(1), arguing that Complainant had not met his burden of proving a *prima facie* case of discrimination. Complainant verbally responded to Respondent's motion. The undersigned ALJ took the matter under consideration and set a telephone conference for the following day, February 10, 2004, at 1:00 p.m., to rule upon Respondent's motion. On February 10, 2004, prior to the telephone conference, Complainant filed a Motion to Continue the Hearing arguing that, after consulting with an attorney, Complainant had decided he should testify and, therefore, he was requesting the hearing be continued to allow him to do so.

At the telephone conference on February 10, 2004, the undersigned ALJ denied Complainant's Motion to Continue and granted Respondent's Motion to Dismiss. Complainant's Motion to Continue was denied due to the unfair prejudice to Respondent of allowing Complainant to present further evidence, including testifying himself, after having

had the benefit of listening to Respondent's legal analysis of the evidence deficiencies in Complainant's case-in-chief. Respondent's Motion to Dismiss is granted as provided for in the remainder of this Initial Decision.

#### STANDARD OF REVIEW

In ruling on a motion to dismiss under C.R.C.P. 41(b)(1), at the conclusion of Complainant's case-in-chief, the administrative law judge may weigh the evidence, determine issues of credibility, and reach all permissible inferences, including those favoring the Respondent. *First Nat'l Bank v. Groussman*, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

#### FINDINGS OF FACT

- 1. Complainant is an African-American male who began working for CDOT in August 2002 as an Engineer in Training ("EIT") in CDOT's Region 1.
- 2. As an EIT, Complainant worked with Project Engineers on various projects in field offices throughout Region 1. At least three Project Engineers (Wayne Berg, John Yaetes and Tom Hunt) reported to their supervisor, William Scheuerman, the Resident Engineer for Region 1 and Complainant's immediate supervisor, that there were conflict problems with Complainant.
- 3. Kerry DeJiacomo, a female CDOT employee, reported to Scheuerman that she had seen Complainant driving a state vehicle, on a weekend, in Monument, Colorado. Monument is not located within Region 1.
- 4. When Scheuerman approached Complainant about DeJiacomo's statement, Complainant said that he had been trying to meet with a consultant to discuss a project. When Scheuerman contacted the consultant, the consultant stated that he had never had a meeting with Complainant and had not been contacted about such a meeting.
- 5. Wes Goff, a Program Engineer for Region 1 and Complainant's second level supervisor, initiated the investigation into Complainant's alleged misuse of a state vehicle.
- 6. During the investigation into the state vehicle allegations, allegations arose that Complainant had engaged in sexual harassment and workplace violence including referring to DeJiacomo as a "fucking cunt" and "fucking wacko bitch;" being verbally aggressive and intimidating to the teacher at one of Complainant's training classes; and being aggressive in his interactions with a contractor.
- 7. Jeff Kullman, the Region 1 Transportation Director and Complainant's third level supervisor and appointing authority, initiated an investigation into the allegations

- sexual harassment and workplace violence. He assigned portions of the investigation to Goff and Catirino Martinez, CDOT's Region 1 EEO Officer.
- 8. On April 29, 2004, Kullman met with Complainant to discuss the allegations of sexual harassment, workplace violence and misuse of a state vehicle against Complainant and to listen to Complainant's response to those allegations.
- 9. Kullman discussed the incident with DeJiacomo who told him she ws scared to talk to Complainant alone.
- 10. Prior to making his decision, Kullman considered the information Complainant had provided during his April 29<sup>th</sup> meeting and the information Goff and Martinez obtained during their investigations.
- 11. On May 5, 2003, Kullman notified Complainant, in writing, that he was terminating Complainant's employment with CDOT for using vulgar and hostile language to describe a supervisor, engaging in aggressive behavior and using vulgar language towards co-workers, failing to follow the chain of command, and misuse of a state vehicle.
- 12. Complainant timely filed his appeal with the State Personnel Board.

#### DISCUSSION

A probationary employee is entitled to the same rights as a certified employee except that probationary employees are not entitled to a hearing to review a disciplinary action for unsatisfactory performance. Colo. Const. art. XII, § 13(10) and C.R.S. § 24-50-125(5). Probationary employees do not have a right to a pre-disciplinary meeting. Board Rule R-4-10, 4 CCR 801. While the Board does not have jurisdiction to review a probationary employee's disciplinary action for unsatisfactory performance, it may review an action in which a probationary employee has alleged discrimination, constitutional violation, or another independent basis for a hearing. C.R.S. § 24-50-125.3 and *Williams v. Colo. Dep't of Corrections*, 926 P.2d 110, 113 (Colo. App. 1996). Complainant alleged racial discrimination, and, as set forth above, the matter was set for an evidentiary hearing after proceeding through the Board's discretionary review process. Board Rule R-8-45, 4 CCR 801.

Race discrimination is one form of discrimination that is prohibited in Colorado. § 24-34-402, C.R.S. and Board Rule R-9-3, 4 CCR 801. Complainant alleges that his termination was racially discriminatory because other similarly situated employees who behaved in a similar manner were not terminated. Respondent argues that this matter should be dismissed because Complainant has not met his burden of making a *prima facie* case of discrimination.

Colorado's Supreme Court has enunciated a three-step analysis for evaluating

claims of employment discrimination, including claims of racial discrimination. *Colo. Civil Rights Comm. v. Big O Tires*, 940 P.2d 397 (Colo. 1997) and *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288 (Colo. 2000). Initially, Complainant must establish by a preponderance of the evidence a *prima facie* case of discrimination. *Big O Tires*, 940 P.2d at 400. The burden of production then shifts to Respondent to provide a legitimate non-discriminatory reason for the adverse employment decision. *Bodaghi*, 995 P.2d at 297. The Complainant must then show the presumptively valid reason(s) is false, a pretext for discrimination, and is not worthy of credence. *Big O Tires*, 940 P.2d at 401.

The elements of a *prima facie* case include a showing that (1) Complainant belongs to a protected class; (2) Complainant was qualified for the job at issue; (3) Complainant suffered an adverse employment decision despite his qualifications; and (4) the evidence supports an inference of unlawful discrimination. *Big O Tires*, 940 P.2d at 400-01.

It was undisputed by Respondent that Complainant had established the first three elements of a *prima facie* case of discrimination. Complainant is an African American, he was qualified for his position as an EIT and, when he was terminated, he suffered an adverse employment decision. However, Complainant failed to meet the fourth prong of the *Big O Tires prima facie* case of discrimination. The credible evidence did not establish that there was an inference of discrimination regarding Complainant's termination.

Complainant did not present any evidence that would show that similarly situated employees, either probationary or certified, who were not in Complainant's protected class, were treated differently. Complainant did not present any evidence that non-African Americans, either probationary or certified, engaged in the same behavior and were not disciplined.

While there was testimony that people in Complainant's office regularly used profanity in the workplace, there was uncontested testimony from Complainant's own witnesses that no one had ever heard any other employee be aggressive, vindictive or personal towards another employee in their use of profanity. None of Complainant's witnesses were able to recall a single incident in which another employee used profane language to describe a fellow employee. Complainant's language was profane, aggressive and personal and was directed towards one particular employee, DeJiacomo. In addition, Complainant failed to establish that any other CDOT employee had used a state vehicle for a personal use and had not been disciplined. Complainant has failed to meet the fourth prong of establishing a *prima facie* case of discrimination by failing to provide any credible evidence that he was treated differently from other similarly situated employees.

By failing to meet the fourth prong of a *prima facie* case of discrimination, Complainant has failed to meet his burden of establishing *prima facie* case of discrimination. Therefore, this matter is **dismissed with prejudice.** 

Dated this \_\_\_\_ day of March, 2004, at Denver, Colorado

Kristin F. Rozansky Administrative Law Judge 1120 Lincoln, Suite 1420 Denver, Colorado 80203

#### NOTICE OF APPEAL RIGHTS

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

# **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on  $8 \square$  inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

# **CERTIFICATE OF SERVICE**

foregoing ORDER RE: RESPONDENT'S MOTION TO DISMISS in the United States mail, postage prepaid, addressed as follows:	
Kem Reliford 18329 East Mainstreet #14104 Parker, Colorado 80134	
Stacy Worthington First Assistant Attorney General Department of Law Employment Law Section 1525 Sherman, 7 <sup>th</sup> Floor Denver, CO 80203	

Andrea C. Woods